***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

ORIGINAL

# 74-2478

*To be argued by*
ROBERT POLSTEIN

## United States Court of Appeals
**FOR THE SECOND CIRCUIT**

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UNITED STATES OF AMERICA,

*against*

PETER BECKERMAN,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## APPELLANT'S REPLY BRIEF

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## POINT I

### The Order Denying The Motion To Dismiss The Indictment On The Ground of Double Jeopardy Is Appealable.

If the determination of defendant's right not to be twice put in jeopardy must be delayed until after a second trial, he will already have lost the very right he is now seeking to protect:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188 (1957).

The double jeopardy clause is a guaranty "not against being twice punished but against being twice put in jeopardy." United States v. Ball, 163 U.S. 662 (1896).

Thus, we urge that if Beckerman is forced to undergo the expense, anxiety and exposure of a second trial as a condition precedent to his right to argue that such a retrial should never have been permitted, that precise constitutional safeguard will have been irrevocably lost.

In United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972), the court carefully analyzed and ruled on the identical facts and issues raised on this appeal and held that an order denying a motion to dismiss an indictment on the ground of double jeopardy is a final appealable order.

The defendant in Lansdown was charged with armed bank robbery and conspiracy to commit armed bank robbery. The jury, after deliberating eleven hours, was dismissed by the District Court Judge, and a mistrial was declared on the ground that the jury was hopelessly deadlocked. Defendant then moved to dismiss the indictment on the ground that jeopardy had attached at his first trial, and a retrial would violate his constitutional guaranty against double jeopardy. The District Court Judge denied the motion and the defendant appealed.

The Court of Appeals held that the order denying the motion to dismiss the indictment on the ground of double jeopardy was appealable. The Lansdown court (citing the same cases relied upon by the Government herein at page 6 of its brief) recognized that in the usual case, an order denying a motion to dismiss an indictment is not appealable. However, under certain "exceptional and narrow circumstances" an appeal could be taken.

The circumstances under which an appeal could be taken from an otherwise non-final order were carefully detailed by the Supreme Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). The order must

> "fall in that small class which finally determined claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The order is appealable if

> "it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

If appeal is delayed until a final judgment is entered

> "it will be too late effectively to review the . . . order and the right . . . will have been lost, probably irreparably." 37 U.S. at 546, 547.

The Court of Appeals in Lansdown held that an order must possess three characteristics to be final and appealable under the Cohen doctrine:

> "(1) It must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied at review; and (3) the question presented must be such that, if review is postponed until final termination of the case, the claimed right will be irreparably lost." 460 F.2d at 170-171.

The court in Lansdown found that the order appealed from possessed these characteristics and was, thus, final and appealable. Defendant's Fifth Amendment right not to be twice placed in jeopardy was held to be separable from, and collateral to, the main cause of action (i.e., whether he was innocent or guilty of the crimes charged). The right involved was a constitutional one and, therefore, was too important to be denied review.

Finally, the court held, if the review were delayed until the close of the second trial, the claimed right -- to be free from being twice forced to stand trial for the same offense -- would be irreparably lost.

The reasoning of the court in Lansdown, far from being "neither convincing nor correct" as charged by the appellee, is sound, reasonable and just. The real absurdity would lie in requiring a defendant to be put twice in jeopardy before allowing him to assert his privilege against being put twice in jeopardy.

The cases upon which appellee relies most heavily are not inconsistent with the granting of appeal in the instant case. In United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963), defendant never asserted the claim that a re-trial would violate his right against double jeopardy. Instead, he sought an appellate determination that one

count of the indictment should have been dismissed for lack of evidence. This was not a collateral claim, it did not involve any important right, and a postponement would not have deprived defendant in that case of his remedy. Clearly, in the case at bar, the order is collateral, it does involve an important and fundamental right, and a postponement of review will cause defendant irreparable loss of his privilege not to be twice placed in jeopardy.

The second case relied on by the Government is United States v. Ford, 237 F.2d 57 (2d Cir. 1956) vacated as moot 355 U.S. 38 (1957). In Ford the jury found defendant guilty on three counts of an indictment, acquitted him on one count and was unable to reach a verdict on another count, and the trial judge directed a verdict of acquittal on that count. Defendant moved for a verdict of acquittal on all counts or, in the alternative, for a new trial. The District Judge then vacated his previous verdict of acquittal. On appeal, defendant argued that a retrial on the first count would violate his right against double jeopardy. The Court of Appeals affirmed the conviction on three counts and dismissed the appeal as to the remaining count, holding that issue was not yet appealable as the order was interlocutory.

The Government's reliance on this case demonstrates the weakness of its position. In the first place, Ford is not inconsistent with Lansdown, since the court in the latter case clearly limited its decision, stating:

> "Our holding is limited to the narrow facts and circumstances of this case . . . nor does our decision apply to those cases where the mistrial is declared at the request of the defendant since in those cases the defendant has waived any claim of double jeopardy." 460 F.2d at 171 n. 8.

In Ford, although defendant was found not guilty on the first count, he waived his double jeopardy claim when he asked the court for a new trial. Appellant in the instant case has clearly not waived any double jeopardy claim.

Secondly, Ford went to the Supreme Court where it was remanded to the District Court with directions to vacate the judgment of conviction and to dismiss the indictment. A judgment which is vacated, reversed or otherwise set aside by the Supreme Court is thereby deprived of all conclusive effect. 1B Moore's Federal Practice, ¶ 0.416[2].

Finally, the Court of Appeals in Kaufman and [illegible] devoted a total of only two paragraphs to the question of appealability. Clearly, this was not the major issue in either of the cases. The Cohen doctrine -- which this Court has called the "cornerstone" in determining which

interlocutory orders are appealable, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) -- was neither discussed nor applied in either Kaufman or Ford.

This Court, in considering the Cohen doctrine, has ruled in a manner consistent with allowing an appeal in the instant case. In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra, the Cohen doctrine was applied to permit an appeal from an order denying disqualification of counsel. The court held that the appeal was proper where:

> ". . . the order is collateral to the main proceedings yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." 296 F.2d at 805.

Similarly, in Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) this Court permitted an appeal from orders consolidating stockholders' class and derivative suits and denying a motion for severance. In so holding, the court explained:

> "The appealability of the orders before us turns, therefore, on whether either order finally determines collateral rights that are too important to be denied review or to be deferred until the entire case is adjudicated. In resolving this issue we are fortunate in having the benefit of some carefully considered opinions in the very area now before us . . ." 477 F.2d at 715.

This Court is again fortunate, for it has, in the instant case, the benefit of Lansdown v. United States, supra, a carefully considered opinion setting forth compelling reasons demonstrating the appealability of an order denying a motion for dismissal of an indictment on the ground of double jeopardy.

## POINT II

### The Trial Court's Declaration Of A Mistrial Was An Abuse Of Discretion

Human nature being what it is, a motion requesting a trial court to reverse itself is usually not a very profitable undertaking. Judges, like any other human beings, are not too receptive to the idea of admitting that they may have erred in their initial ruling. Accordingly, it is not surprising that Judge Motley refused to find that her sua sponte declaration of a mistrial was not an abuse of her judicial discretion.

The Government, in urging that defense counsel's actions amounted to a "knowing and deliberate acquiescence in the discharge of the jury" (G 13)*, completely ignores the realities of a hotly contested criminal trial.

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* References to the Government's brief are preceded by "G" with the page number following.

When the jury sent in its "deadlock" note, there was no reason for defense counsel to suspect that the disagreement was anything less than hopeless. However, a few minutes later, when the forelady made her surprising statement, defendant's lawyer -- for the very first time -- was apprised of the fact that the jury was not irrevocably deadlocked and that further deliberations might well result in an acquittal. The forelady's precise statement was:

> "It is very hard to say. We are all very tired at this time and our biggest problem is we don't think we have enough evidence and this is our biggest hassle and maybe another time, another day we may be clearer." (A 32).

Because of the Government's claim that this statement, in some unexplained manner, was an expression to the court that there was no possibility for the jury to reach a verdict, a careful analysis of the forelady's exact phraseology becomes necessary.

When asked by the court whether the note they had sent in meant "that you are not able to reach a verdict", the forelady replied, "<u>It is very hard to say</u>" -- hardly an unequivocal declaration that there was no chance whatsoever for reaching a decision.

"<u>We are all very tired at this time</u> . . .", was tantamount to a plea for additional time to deliberate.

"[O]ur biggest problem is we don't think we have enough evidence and this is our biggest hassle . . .", certainly was a definite indication that the prosecution had not sustained its burden of proof.

"[M]aybe another time, another day we may be clearer", constitutes a clear announcement that with some additional time a verdict could be reached.

Now, at 9:30 p.m. on a Friday evening, faced with a jury's declaration that they were "all very tired at this time", defense counsel was caught on the horns of a dilemma. If, facing the bleary-eyed and somewhat exasperated jury panel at that late hour, he stated in open court that they should be forced to deliberate further, defense counsel faced the very real problem of alienating the jury. On the other hand, if he remained silent, his silence might have been construed as acquiescence in the mistrial. In United States ex rel. Russo v. Superior Court of N.J., etc., 483 F.2d 7, 17 (3d Cir.), cert. denied 414 U.S. 1023 (1973), the court recognized such difficulty:

> ". . . to have objected in front of the jury might have prejudiced appellant for trying to 'show up' the trial judge, especially if some members of the jury actually did want to go home despite their civic obligation."

Accordingly, defense counsel took the middle course of asking whether he could "make a suggestion". The court

refused to hear counsel. This colloquy occurred before the court summarily discharged the jury (A 32). Then, before the panel had physically left the jury box, defense counsel requested that the court repeat its charge on burden of proof, which request was refused (A 32).

Cases are not tried in a vacuum. The exigencies of a hotly contested criminal trial often dictate conduct of counsel that could be improved upon contemplative hindsight. In an effort not to engender the jury's animosity, we did not bluntly insist that the jury be given more time to deliberate, but offered a "suggestion" and requested a further charge. By no stretch of the imagination, however, could such conduct constitute the "knowing and deliberate acquiescence" that the Government now urges.

The Government's reliance upon United States v. Cording, 290 F.2d 392 (2d Cir., 1961), is misplaced. There, "the foreman reported that the jury had not been able to agree and that there was no likelihood of their agreeing if they were kept out longer" (p. 393). Here, on the other hand, the forelady clearly stated that "maybe another time, another day we may be clearer." The factual difference between the two cases is so striking as to warrant no further comment.

Finally, we cannot understand the prosecution's statement that, "Beckerman inexplicably speculates that

the jury was on the verge of a verdict of acquittal" (G 13). After some four hours of actual deliberation the forelady of the jury flatly stated, ". . . we don't think we have enough evidence". We cannot think of any clearer announcement that the prosecution had failed to sustain its burden of proof.

Accordingly, under the particular circumstances of this case, we submit that Judge Motley's discharge of the trial jury was a clear abuse of judicial discretion and that a retrial would just as clearly violate defendant's Fifth Amendment right not to be twice put in jeopardy for the same offense.

## CONCLUSION

The order appealed from should be reversed and the indictment herein should be dismissed.

Dated: New York, New York
February 6, 1975

Respectfully submitted,

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Due and timely service of TWO copies of the within REPLY BRIEF is hereby admitted this 7TH day of FEBRUARY 1975

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Attorney for APPELLEE

PAUL J. [redacted]URRAN